No. 17298

In the United States Court of Appeals

For the Ninth Circuit

CMAX, INC., also d.b.a. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,
Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,
Appellee.

Appellant's Reply Brief

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JURISDICTION

This Court has jurisdiction, if as appellant contends, it is claiming under two distinct causes of action. In its first cause of action appellant pleaded a common count for money due on account of services rendered. Instead of pleading the separate items making up the account, pleading the common count states a cause of action distinct from causes of action on each separate item. In *Witkin,* 2 California Procedure p. 1239 (1954), the author says:

> "The averment of an indebtedness, not by stating the actual ultimate facts in each particular case, but by using one of a series of generalized forms consisting in part of legal conclusions, is directly opposed to a basic principle of code pleading. Nevertheless, when the codes were adopted the familiarity of lawyers with the form, and its simplicity and convenience, were sufficient to overcome this objection. And today in nearly all code states and in the federal practice, the common counts are permissible and widely used. In California it is settled that they are good against special as well as general demurrers."

See (*Pike v. Zadig,* (1915) 171 Cal. 273, 276, 152 Pac. 923; *Weitzenkorn v. Lesser,* (1953) 40 C. 2d 778, 793; *Ferro v. Citizens National Trust & Sav. Bank,* 44 C. 2d 401, 409 (1955).)

The second count of the complaint alleges a separate and distinct cause of action under the 1917 amendment to *Code of Civil Procedure* Section 337, 2 (1). [T. 7]. The language of the amendment here involved is in the following words: "An action to recover upon a book account whether consisting of one or more items."

"The cause of action is upon the account, not upon the separate charges which enter into it. When, therefore, four years have run from the date of the last entry in the account, action on the entire account is barred, but the action is not barred piecemeal as to the

several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action (*Egan v. Bishop,* 8 C.A. 2d 119, 123 (1935).)" See also, *Kaupke v. Lemoore Canal & Irr. Co.,* (1937) 20 Cal. App. 554, 561; *Bailey v. Hoffman,* (1929) 99 Cal. App. 347, 351; *Moss v. Underwriters Report, Inc.,* (1938) 12 Cal. 2d 266, 271, 83 P. 2d 503. A book account is created by the agreement or conduct of the parties thereto. In *Gardner v. Rutherford,* 57 C.A. 2d 874, 885, the Court said:

> "In the instant case, however, it is clear from the testimony and the books themselves that the so-called rent account was carried on the books of the corporation as a complete account showing the transactions as to the rent, that it was intended by the parties to be so carried on the books of the corporation, and that the finding of the trial court that the rent account was carried on the books of the corporation as an open book account is supported by the evidence."

See to the same effect, *Warda v. Schmidt,* (1956) 146 C.A. 2d 234, 237, in which the Court said:

> "However, the parties to a written or oral contract, may, by agreement or conduct, provide that monies due under such contract shall be the subject of an account between them. (*Mercantile Trust Co. v. Doe,* Supra, 26 Cal. App. 246; *Gardner v. Rutherford,* supra, 57 Cal. App. 2d 874, 886; *Parker v. Shell Oil Co.,* supra, 29 Cal. 2d 503, 507.) In that

> event a cause of action arising therefrom is on the account and not on the underlying contract. (*Parker v. Shell Oil Co.,* supra, 29 Cal. 2d 503, 507.) Such is the situation in this case."

Entirely apart from the applicable statute of limitations to the two causes of action here involved, they differ materially. The first cause of action consists of items known as air bills on which the first cause of action is based. No further action is required by either party, whereas under the second cause of action, in addition to the foundation items, the party claiming a cause of action under a book account must make a book record of the various items and in addition thereto must establish agreement by the opposite party either expressly or by conduct that the financial transactions between the two parties shall be so treated.

Appellant concedes that it inadvertently incorporated by reference the third paragraph of paragraph numbered 8 of the First Count in the Second Count. If counsel's attention had been called to this obvious inadvertence, leave would have been sought from the trial judge to have this portion of paragraph 8 deleted from the Second Count. This inadvertence and error was not given consideration by the trial Court or by opposing Counsel and should not be given consideration now.

Appellant believes that the District Judge was justified in making the determination that there was no just reason for delay in entering judgment on the Second cause of action. This action is consistent with two late decisions of the U.S. Supreme Court (*Sears Roebuck & Co.,* 1956, 351, U.S. 427, and *Cold Metal Products Co. v. United Eng. & F. Co.,* 1956, 351, U.S. 445.) See also, decisions of this Court. (*Steiner v. 20th Century-Fox Film Corp.,* 9 Cir., 232 F. 2d 190, 193; *School District No. 5 v. Lundgren,* 259 F. 2d 101, 104; *Atkins Knoll (Guam) Ltd. v. Cabrera,* (1960) 277 F. 2d 922, 924.)

The jurisdiction of the trial judge to render the decision made in this case is not established by the decisions cited by appellee in its brief on page 2 thereof. In the *Sauquoit Valley* case the motions for judgment on the pleadings and for summary judgment were heard together. The same was true in the *Palmer* case. Since these decisions were rendered, Rule 12(c) was amended in 1946 by the addition of the following sentence:

> "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Appellee quotes from the memorandum of the trial judge [T. 29] as follows:

> "Excluding all matters in the file outside the pleadings, it is alleged in the complaint, and not denied in the answer, that the last shipments made by plaintiff for defendant were in February, 1957."

Did the trial judge acquire jurisdiction to rule on the motion for judgment on the pleadings notwithstanding that the ONLY MOTION extensively argued was the motion for a summary judgment? (Emphasis supplied). It would seem reasonable that the only purpose of filing a motion for summary judgment at the same time that a motion for judgment on the pleadings is filed, is for convenience. This practice contemplates that the motion for judgment on the pleadings is heard forthwith or first, and if it is denied the other motion is heard after the receipt of affidavits, answers to admissions and interrogatories. In this case there was no separate submission, or any submission, of the first motion . The twin motions were filed on April 1st 1960 [T. 13], together with the affidavit of John Harman [T. 15]. Prior to the filing of the motions, Appellee had filed a Request for Admission of Facts [T. 16] in February 1960. The memorandum of opinion of the Trial Judge was not filed until December 28, 1960 [T. 30].

Finally, Appellee contends that "no prejudice to Appellant resulted from the Court's dismissal of the Second Count on one ground rather than the other." This is true, if the trial court had jurisdiction to act as it did. If the trial court's action was without jurisdiction, the parties cannot by acquiescence or consent confer jurisdiction.

In 1946, Rule 12(b)6 was also amended by the addition of the same sentence made to Rule 12(c), supra. Several recent decisions have applied the amended Rule 12(b)6: *Mantin v. Broadcast Music,* 1957, 248 2d 530 and *McPherson v. Amalgamated Sugar Company,* 1959, 271 F. 2d 809, 810. We have found no authority, authorizing the rendition of a judgment on the motion to dismiss or for a judgment on the pleadings without also rendering a judgment for summary judgment, when matters outside the pleadings were presented. If this Court decides that the trial court was without jurisdiction, appellant is entitled to costs under Rule 25 (3) of this Court.

REPLY TO APPELLEE

Appellee begins its argument by stating what it contends its position to be, as follows:

(1) "The first count alleges an express contract or contracts . . . The second count alleges an open book account based on the same facts." The facts are that for a first count appellant alleged that for its services there was due 28,781.85 dollars upon which the appellee

paid 16,085.76 dollars leaving a balance of 12,696.09 dollars due and unpaid [T. 6]; and for a second count appellee became indebted to appellant in the sum of 12,696.09 dollars upon an open book account [T. 7]. The differences between the two causes of action have been explained at the outset in this reply, and in the interest of brevity will not be repeated.

(2) "The second count attempts to add to the supposed "account" items that were not included therein at the time the account was current. This is not permitted." The facts are that the amount claimed is the same under both counts. As explained in appellant's opening brief [p. 8], that under the 1917 amendment to Section 337 C.C.P. the expression "a book account" includes and refers to an open book account and also to a book account. What appellee means by its dogmatic statement, "This is not permitted," is of doubtful meaning.

(3) If appellant correctly interprets this item it is that appellee contends that appellant did not plead a sum due upon a book account.

Appellee divides its argument into four parts. Appellant will reply thereto in *seriatim*.

1. APPELLANT HAS PLEADED TWO SEPARATE AND DISTINCT CAUSES OF ACTION.

At the outset in this reply brief, appellant has explained the two separate causes of action. In that connection it also explained its inadvertence in alleging portions of paragraph 8 by reference as a part of Count 2. Appellant may add, that such portions may be characterized as surplusage.

Appellant discloses as an introduction to its Second Count and pursuant to an audit, the claimed undercharges were entered on its books of account in the month of August, 1959, which appellee alleges took place two and a half years after the last shipment was tendered to appellant by appellee [p. 6]. As explained under the heading "*Jurisdiction,*" a book account is created by the agreement or conduct of the parties thereto, and such relationship not having been rescinded at the time the last entry was made in August, 1959, the entry on the books is valid. If the last previous entry on the books took place in February 1957, the four year statute of limitations commenced to run from that date. (*Schneider v. Oakman Consol M Co.,* 38 Cal. App. 338, 341, 176 P. 177; *Gardner v. Rutherford,* 57 C.A. 2d 874, 883, 136 P. 2d 48; *Rosetti v. Heiman,* 126 C.A. 2d 51, 56, 271 P. 2d 953.) Since the August 1959 entry, the four year statute runs from that date.

Under the 1917 amendment of Section 337 C.C.P. subdivision 2, the action is on the entire account and not on the individual or separate items.

2. AFTER ITEMS ARE BARRED BY THE STATUTE OF LIMITATIONS THEY CANNOT BECOME ITEMS OF AN OPEN ACCOUNT.

This heading does not correspond with point 2 of Appellee's argument [p. 4] but is consistent with the quotation from *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48, 55:

> "The law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of *pleading that claim* as an open account."

The authorities cited in *Parker v. Shell Oil Co.,* supra, were never treated by the parties as items of an open account, and under such circumstances, one party cannot evade the bar of the statute of limitations by pleading an open account. (*Parker v. Shell Oil Co.,* 29 C. 2d 503, 507.)

The case of *Cleaveland v. Inter City Parcel Service, Inc.,* 22 Cal. App. 2d 574 had to do with a claim for additional rent. Suit on book account was not sustained as the books of account did not show the alleged additional rent. Appellant fails to see how this decision tends to prove any issue here.

3. APPELLEE CONTENDS THAT APPELLANT HAS NOT PLEADED AN OPEN ACCOUNT.

Presumably, appellee addresses this contention to the form of the pleading. The Second Count is pleaded in the following language:

> "By reason of the aforesaid services rendered during the aforesaid period, the defendant became indebted to the plaintiff in thesum of 12,696.09 dollars upon an *open book account,* said sum of 12,696.09 dollars being the balance due and owing to plaintiff."

Appellee cites no authorities, which are in point. The cited cases deal with proof and not with pleading.

4. APPELLEE CONTENDS THAT APPELLANT HAS NOT PLEADED A BOOK ACCOUNT.

Appellant has no quarrel with the decisions cited. None of them are in point, however the case of *Egan v. Bishop,* 8 Cal. App. 2d 119, is generally considered as one of the leading cases on "book account claims." On page 123, under paragraph [6], the court states the fundamental principle governing book accounts. Appellant fails to see, how the quotation from that case to the effect that the creditor could not revive an item of his claim by pleading it as part of a book account, aids the appellee here, either on the issue of pleading or proof. The book account item here in question was en-

tered on the appellant's books before it was barred by the statutes.

In the *Burchell v. Rohnert* cited by appellee 133 C.A. 2d 82, 86-87, the claimant sought the benefits of the book account statute without a showing that the adjusted claim had been entered on the books of the parties.

Failure of proof to establish a book account, as in *Tipps v. Landers* cited by appellee does not meet any issue here.

Appellee distinguishes the *Warda v. Schmidt* case on the question of delayed entries because of the practice in the industry known to both parties. In this connection it might be mentioned that both appellant and appellee were conclusively presumed to know that the transportation charges based on published tariffs could not be varied under any pretext. The *Warda* case also cites *Schneider v. Oakman Consol M. Co.,* 38 C.A. 338, 341, 176 P. 177 a case of delayed entry on the books of the parties.

In referring to the case of *Higby v. Burlington C. R. & N. Ry. Co.,* 99 Iowa 503, 68 N.W. 829 cited by appellant in its opening brief [p. 10], appellee argues that this case is distinguishable because it involved overcharges whereas the case at bar involved undercharges. This seems a distinction without a difference, as both involved adjustment in the charges that had been made previously.

Finally, appellee on page 11 treats the claim here as a revivor of a barred claim which of course, it is not. Although, appellant in its opening brief cited cases in point on delayed entries, appellee ignored them in its reply brief.

Respectfully submitted,

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